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88-1502

No.

Supreme Court, U.S.
FILED
MAR 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

MARVIN B. ENOCHS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER 18 U.S.C. SECTION 511 (RELATING TO TAMPERING WITH VEHICLE IDENTIFICATION NUMBERS) REQUIRES BEFORE A DEFENDANT MAY SUFFER A FELONY, CRIMINAL CONVICTION THAT THERE BE ALLEGATION AND PROOF OF A DEFENDANT'S CRIMINAL INTENT, THAT IS TO SAY THAT DEFENDANT ACTED WILLFULLY OR WITH THE INTENT TO VIOLATE THE LAW.

A. WHETHER AN INDICTMENT FOR VIOLATION OF 18 U.S.C. SECTION 511 MUST BE DISMISSED BECAUSE IT FAILS TO ALLEGE THAT DEFENDANT ACTED WILLFULLY OR WITH THE INTENT TO VIOLATE THE LAW, BOTH BECAUSE SUCH INTENT IS AN ESSENTIAL ELEMENT OF 18 U.S.C. SECTION 511 AND BECAUSE SUCH AN INDICTMENT DEPRIVES DEFENDANT OF HIS FIFTH AMENDMENT RIGHT TO ANSWER ONLY TO A GRAND JURY AND HIS FIFTH AND SIXTH AMENDMENT RIGHTS TO FAIR NOTICE FOR PREPARATION OF A PROPER DEFENSE AND TO BE FREE FROM DOUBLE JEOPARDY.

B. WHETHER 18 U.S.C. SECTION 511 IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO THIS DEFENDANT BOTH BECAUSE IT IS OVERLY VAGUE AND BECAUSE THE PENALTIES AND STIGMA OF CONVICTION UNDER THIS STATUTE ARE TOO SUBSTANTIAL WHEN THERE IS NO CRIMINAL INTENT REQUIREMENT, THUS VIOLATING DEFENDANT'S FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW.

C. WHETHER 18 U.S.C. SECTION 511 VIOLATES THE PROSCRIPTION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AGAINST CRUEL AND UNUSUAL PUNISHMENT BECAUSE IT PROVIDES FOR FIVE (5) YEARS IMPRISONMENT, OR A $250,000 FINE, OR BOTH, FOR A VERY MINOR, MORALLY BLAMELESS, STRICT LIABILITY OFFENSE.

PARTIES

United States of America and Marvin B. Enochs.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit (No. 87-2283), whose judgment is herein sought to be reviewed, was decided and filed on September 21, 1988. This Opinion is reported at 857 F.2d 491 (8th Cir. 1988), and is set forth in the Appendix at A1 through A6. The opinions of the District Court are unreported and are set forth in the Appendix at A7 through A12.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on September 21, 1988, affirming Defendant's conviction of violating 18 U.S.C. Section 511(a) by knowingly removing the Vehicle Identification No. (VIN) from a stolen

vehicle. Petitioner timely filed a Motion for Rehearing by Panel, which was denied by the Court of Appeals on January 13, 1989. A copy of the Order of the Court of Appeals denying the Motion for Rehearing is set forth in the Appendix at A13.

This Petition is filed within sixty (60) days of that denial. This Court has jurisdiction pursuant to 28 U.S.C. Sections 1254(1) and 2101(c).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

United States Constitution Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

United States Constitution Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATUTES INVOLVED

Title 18 U.S.C. Section 511

Altering or removing motor vehicle identification numbers.

(a) Whoever knowingly removes, obliterates, tampers with, or alters an identification number for a motor vehicle, or motor vehicle part, shall be fined not more than $10,000.00, or imprisoned not more than five years, or both.

(b) (1) Subsection (a) of this section does not apply to a removal, obliteration, tampering, or alteration by a person specified in Paragraph (2) of this subsection (unless such person knows that the vehicle or part involved is stolen).

(2) The persons referred to in Paragraph (1) of this section are—

A. A motor vehicle scrap processor or a motor vehicle demolisher who complies with applicable state law with respect to such vehicle or parts;

B. A person who repairs such vehicle or part, if the removal, obliteration, tampering, or alteration is reasonably necessary for the repair; and

C. A person who restores or replaces an identification number for such vehicle or part in accordance with applicable state law.

(c) As used in this section, the term—

(1) "Identification Number" means a number or symbol that is inscribed or affixed for purposes of identification under the National Traffic and Motor Vehicle Safety Act of 1966, or the Motor Vehicle Information and Cost Savings Act;

(2) "Motor Vehicle" has the meaning given that term in Section 2 of the Motor Vehicle Information and Cost Savings Act;

(3) "Motor Vehicle Demolisher" means a person, including any motor vehicle dismantler or motor vehicle recycler, who is engaged in the business of reducing motor vehicles or motor vehicle parts to metallic scrap that is unsuitable for use as either a motor vehicle or motor vehicle part;

(4) "Motor Vehicle Scrap Processor" means a person—

(A) Who is engaged in the business of purchasing motor vehicles or motor vehicle parts for reduction to metallic scrap for recycling;

(B) Who, from a fixed location, uses machinery to process metallic scrap into prepared grades; and

(C) Whose principal product is metallic scrap for recycling; but such term does not include any activity of any such person relating to the recycling of a motor vehicle or a motor vehicle part as used motor vehicle or a used vehicle part.

STATEMENT OF THE CASE

Defendant was charged in two separate indictments. The first indictment was filed on March 9, 1987, and charged Defendant with one count of violating Title 18 U.S.C. Section 511, and one count of violating Title 18 U.S.C. Section 2320. The second indictment, filed on March 10, 1987, charged the Defendant and a co-Defendant with one count of violating Title 18 U.S.C. Sections 511 and 2. On March 30, 1987, Defendant filed a Motion to Dismiss each indictment. One motion requested that the indictments be dismissed for failure to state an offense and further asserted that the indictments failed to allege an essential element of Title 18 U.S.C. Section 511, in that the indictment did not allege Defendant acted willfully or with criminal intent. The indictment in this case charged:

> On or about November 1, 1986, in the Western District of Missouri, Marvin B. Enochs and Gregory A. Wilcox did knowingly remove and tamper with a motor vehicle identification number (VIN) to wit: a plate bearing VIN No. 1LNBP96F8DY600448, which had been lawfully affixed by the manufacturer to a 1983 White Lincoln Towncar for purposes of identification; all in violation of Title 18, United States Code, Sections 511 and 2.

The second motion urged dismissal of the indictment on the basis that Defendant asserted that 18 U.S.C. Section 511 was unconstitutional. On June 3, 1987, the Honorable Elmo B. Hunter, Senior United States District Judge for the Western District of Missouri, entered orders denying both motions. The District Court had jurisdiction over the case pursuant to 18 U.S.C. Section 3231.

On July 2, 1987, Defendant entered a conditional plea of guilty pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure, which was tendered to, and accepted by, the Honorable Judge Hunter. Pursuant to that agreement, Defendant pleaded guilty to one count of violating Title 18 U.S.C. Section 511 with which he was charged individually in the first indictment and all other charges were dismissed. In accordance with the conditional plea of guilty, Defendant retained the right to appeal the orders denying dismissal of the indictment based on failure to state an offense and the unconstitutionality of Title 18 U.S.C. Section 511. During his plea on July 2, 1987, Defendant stated he did not know that tampering with a VIN Number was in violation of the law. (See Hearing Transcript, p. 16.)

On September 8, 1987, the Court suspended the sentence and ordered Defendant to serve five years probation. Defendant was also ordered to pay $28,624.00 in restitution to the Federal Bureau of Investigation and to serve 400 hours of community service within three years. Defendant filed a timely Notice of Appeal on September 15, 1987. On appeal to the United States Court of Appeals for the Eighth Circuit, Defendant argued that the district court erred in not dismissing the indictment against him even though the indictment tracked the statutory language of Title 18 U.S.C. Section 511 because: (a) the statute omits the essential element of willfulness and criminal intent; and (b) without an allegation that Defendant acted willfully or with the specific intent to violate the law, the indictment could not withstand a constitutional challenge based upon Defendant's rights not only to answer only to charges properly found by a Grand Jury under the Fifth Amendment to the United States Constitution, but also to fair notice for

preparation of his defense and to be free from double jeopardy under the Fifth and Sixth Amendments to the United States Constitution. Defendant further argued that Title 18 U.S.C. Section 511 is unconstitutional because it is overly vague in violation of the due process clause of the Fifth Amendment to the United States Constitution and because it caused cruel and unusual punishment to be inflicted upon Defendant in violation of the Eighth Amendment to the United States Constitution because it provided for a felony conviction, possible imprisonment, and/or a $250,000.00 fine for a very minor, morally blameless, strict liability violation of the law.

The United States Court of Appeals for the Eighth Circuit held that Title 18 U.S.C. Section 511(a) did not require specific intent, and therefore the indictment need not allege it. Additionally, the Court stated that the imposition of severe penalties for the commission of a morally innocent act may violate the due process clause of the Fifth Amendment, but the Court stated Defendant did not raise a due process challenge to Title 18 U.S.C. Section 511.[1] The court did not otherwise, in its opinion, deal with the other constitutional challenges made by Defendant.

On October 13, 1988, Defendant filed a timely Petition for Rehearing by Panel which was denied by the United States Court of Appeals for the Eighth Circuit on January 13, 1989.

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1. Defendant asserts a due process challenge was raised as the second issue in his Brief, and was argued before the United States Court of Appeals for the Eighth Circuit.

REASON FOR GRANTING THE WRIT

The decision below decided an important question of federal law which has not been, but should be, settled by this Court.

I. The Decision Below Decided an Important Question of Federal Law, Which Has Not Been, But Should Be, Settled by This Court.

A. The legislative history of Title 18 U.S.C. Section 511, evinces an unequivocal congressional intent to require criminal intent as an essential element of the offense.

The statute is a partial codification of the Motor Vehicle Theft Law Enforcement Act of 1984, Pub. L. No. 98-547. The Act was a result of efforts by Congress to deter the growing organized car theft industry and inhibit "chop shop" activity. The principal weapon of law enforcement under the Act is the vehicle identification number. H.R. Rep. No. 98-1087, pp. 1-7, Vol. 5, *Reprinted in* 1984, U.S. *Code Cong. and Admin. News,* 4628-4633. The legislative history states:

> [The Act] gives law enforcement officials at all levels of government the much needed prosecutory tools to crack criminal theft rings and related racketeering activities, while providing safeguards to *protect the innocent.* The enforcement provisions enable law enforcement officials at all levels to apprehend, successfully prosecute, and *punish motor vehicle thieves.*

H.R. Rep., *supra,* at pp. 2-3 (emphasis added). Thus, the legislative history clearly indicates that innocent persons

were not to be prosecuted or punished under any of the Act's provisions. While the legislative history of Section 511 specifically does not mention what intent is required for that particular section of the Act, the above-quoted legislative purpose removes all doubt as to what Congress intended in this regard. Further, since the purpose of the Act in Section 511 specifically is to punish those involved "directly or indirectly" in "chop shop" activity, and since the "citizen who repairs his own vehicle" is generally excludable from the reach of Section 511, Congress mandated that a violation of Section 511 be willful and with criminal intent just as resolutely as if they had merely stated it. *See,* H.R. Rep. *supra,* at p. 24. Thus, to subject the person who had no intention of violating the law or facilitating vehicle theft to prosecution pursuant to Section 511 would be to scoff at the mandate of our federal legislature. Therefore, in the legislative history of Section 511, Congress did not affirmatively assert that *mens rea* was to be excluded from Section 511. In fact, Congress actually made quite clear its desire to make criminal intent an essential element of a crime.

While all the above evidence is ample support for the specific intent requirement, there is substantially more support for this conclusion. A critical factor is that if the statute were interpreted not to require specific intent, the unfortunate result would be the criminalization of a wide array of apparently innocent conduct. In *Liparota v. United States,* 471 U.S. 419 (1985), this Court read a specific intent requirement into 7 U.S.C. Section 2024(b)(1), which made it a crime to "knowingly" use, transfer, acquire, alter, or possess food stamps in a manner "not authorized by [this statute] or the regulations issued pursuant thereto." *Id.* at 434. The issue before this Court was whether Congress intended the term "know-

ingly" to apply only to the acts of using, transferring, acquiring, altering or possessing, or whether the term also applied to that portion of the statute reading "in any manner not authorized by [the statute] or the regulations." In other words, this Court had to decide whether the statute required proof that the alleged violator used or possessed food stamps in a manner he knew to be unlawful. Because Congress had not "explicitly spelled out the mental state required", the Court's "task" was to determine legislative intent in this regard. *Id.* at 423-24. Given the ambiguity in the statute itself and the fact that the legislative history was silent on the issue, this Court stated, "[A]bsent indication of a contrary purpose in the statute or legislative history of the statute, we believe that Section 2024(b)(1) requires a showing that Defendant knew his conduct to be unauthorized by statute or regulations." *Id.* at 425.

This Court's rationale rested on the fundamental principle deeply rooted in American jurisprudence that a person should not be punished for behavior which is void of unlawful or culpable intent. Further, this Court went on to note that such principles of construction were particularly appropriate where, as in the case before it, to interpret the statute otherwise would be to "criminalize a broad range of apparently innocent conduct." *Id.* at 426. Finally, this Court also recognized the importance of incorporating a *mens rea* element into the statute was consistent with another fundamental principle of construction that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Id.*[2]

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2. Several courts have used this Court's analysis in *Liparota* to require that certain statutes require a specific intent to violate the law. *United States v. Merkt*, 764 F.2d 266 (5th Cir. 1985); *United States v. Schankowski*, 782 F.2d 628 (6th Cir. 1986).

Prior to this Court's decision in *Liparota,* the United States Court of Appeals both for the Eighth and Tenth Circuits decided this issue in the same manner. *United States v. Marvin,* 687 F.2d 1221 (8th Cir. 1982); *United States v. O'Brien,* 686 F.2d 850 (10th Cir. 1982).

Finally, this Court in *Morissette v. United States,* 342 U.S. 246 (1952), held that in order to obtain a conviction pursuant to 18 U.S.C. Section 641, which prohibited the knowing conversion of government property, there had to be specific intent even though the statute seemed facially ambiguous in this regard. That court held that "mere omission from Section 641 of any mention of intent will not be construed as eliminating that element from the crimes denounced." *Id.* at 263. Moreover, that court looked unfavorably upon criminal offenses which did not require criminal intent. *Id.*

Thus, these cases[3] collectively establish a cohesive set of rules and principles to guide the courts in determining congressional intent regarding the *mens rea* element of criminal statutes. The court should be guided by the statute itself, the legislative history, and basic principles of criminal law interpretation. Under the above guide-

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3. Other authorities state that the possibility that a lengthy prison sentence could be imposed is a crucial factor in determining if a statute requires criminal intent. Green, *Implied Culpability Terms in an Offense Definition: Problems with the "Gap-Filler" Provisions in the New Jersey Code of Criminal Justice,* 13 Rutgers L.J. 775 (1982); Hall, *Interrelations of Criminal Law and Torts,* 43 Colum.L.Rev. 753 (1943); Hall, *Prolegomena to a Science of Criminal Law,* 89 U.Pa.L.Rev. 549 (1941); La Fave, Scott, 1 *Substantive Criminal Law,* Criminal Practice Series 343, Section 3.8; Packer, *Mens Rea and the Supreme Court,* 1962 Sup.Ct.Rev. 107; Sayre, *Public Welfare Offenses,* 33 Colum. L.Rev. 55 (1933). A number of state courts have made similar findings: *State v. Strong,* 294 N.W.2d 319 (Minn. 1980); *State v. Collova,* 255 N.W.2d 581 (Wis. 1977); *People v. Clark,* 151 N.E. 631 (N.Y. 1926); *Kruger v. Noel,* 318 N.W.2d 220 (Iowa 1982); *Commonwealth v. Mixer,* 93 N.E. 249 (Mass. 1910).

lines, there exists no justification for failing to find that criminal intent is an essential element of 18 U.S.C. Section 511 and, under these circumstances the indictment should have been dismissed.

The Court of Appeals in its opinion, in this case, interpreted the word "knowingly" as meaning only that a person act "voluntarily and intentionally, and not because of mistake or accident or other innocent reason." The court by this definition did not require that a defendant act with criminal intent, i.e. with a general criminal intent to violate the law, as the court found to be required in *United States v. Marvin,* and with the specific intent to violate a certain criminal statute and/or the elements of the statute as this Court found to be required in *Liparota.* This Court should grant review of this case and reverse the lower court's decision with instructions to dismiss the Indictment.

B. The Indictment must be dismissed for failure to state an offense because it does not allege an essential element of 18 U.S.C. Section 511, namely that the Defendant acted willfully or with the intent to violate the law and thus deprives Defendant of his Fifth Amendment right to answer only to a Grand Jury and his Fifth and Sixth Amendment rights to fair notice for preparation of a proper defense and to be free from double jeopardy.

In the instant case, it is apparent that the government merely tracked the statutory language of 511 and failed to charge the Defendant with violating Section 511 willfully and unlawfully or with unlawful intent. Thus, although the government tracked the statutory language in the indictment, it failed to charge an essential

element of the offense. It is hornbook law that where an essential element of an offense is not contained in statutory language, merely tracking the words of the statute is insufficient; under such circumstances, the indictment must be dismissed. *Morissette,* 342 U.S. at 270; *Goodloe v. Parratt,* 605 F.2d 1041, 1046 (8th Cir. 1979); *United States v. Opsta,* 659 F.2d 848, 850 (8th Cir. 1981); *United States v. Cecil,* 608 F.2d 1294, 1297 (9th Cir. 1979); *United States v. Haldeman,* 559 F.2d 31, 123, n.260 (D.C. Cir. 1976). *See also, United States v. Carll,* 105 U.S. (15 Otto) 611 (1881). This basic rule of law clarifies why the court in *Marvin,* declined to dismiss the indictment in that case. *Marvin,* 687 F.2d at 1228. In *Marvin,* the court determined that 7 U.S.C. Section 2024 (b)(1) required specific intent based on, among other things, the language of the statute itself. *Id.* Thus, merely tracking the statutory language in the indictment sufficiently alleged the proper intent requirement. *Id.*

In *United States v. Denmon,* 483 F.2d 1093 (8th Cir. 1973), the defendant was charged with violating 18 U.S.C. Section 641. This statute did not contain the proper criminal intent requirement, but this Court had earlier determined it was an essential element of the offense. *See Morissette, Id.* The Court held that failure of the indictment to allege the essential element that defendant had acted knowingly, unlawfully *and* willfully was fatal to the prosecution. *Denmon,* 483 F.2d at 1095. The court stated that a defect of this type was "more than a matter of mere form or technical pleading" and that the flaw was "substantive" in nature. *Id.*

Virtually every federal court which has considered the question has ruled that intent elements of an offense, whether spelled out in the statute or not, must

be sufficiently pled in the indictment in order for the indictment to stand. For example, in *Opsta,* the defendant was charged with involuntary manslaughter, a crime which this Court had previously determined required proof of gross negligence and actual knowledge. *Opsta,* 659 F.2d at 849. Although these intent requirements were not part of the statutory language, the court held that as they were essential elements of the crime, therefore, failure to charge them rendered the indictment fatally defective and subject to mandatory dismissal. *Id.* at 850. In *United States v. Mekjian,* 505 F.2d 1320 (5th Cir. 1975), the court held that failure of the indictment to allege that defendant acted "willfully," an essential element of the crime with which he was charged, was fatal to the indictment. *Mekjian,* 505 F.2d at 1324. In *United States v. Hutzel,* 385 F.Supp. 1311 (W.D. Mo. 1974), the court held that although "willfully" did not appear in the statutory language of the offense with which defendant was charged (16 U.S.C. Section 668), the legislative history indicated that it was indeed an essential element of the crime. *Hutzel,* 385 F.Supp. at 1315. Thus, the indictment was subject to dismissal. *Id. See also, United States v. Croft,* 750 F.2d 1354, 1363 (7th Cir. 1984) (indictment which alleged that defendant violated 18 U.S.C. Section 641 "knowingly and unlawfully" held sufficient), *United States v. May,* 625 F.2d 186, 190 (8th Cir. 1980) (indictment which alleged that defendant violated 18 U.S.C. Section 641 "knowingly and willfully" held to sufficiently apprise defendant of the specific intent element of the statute). *Accord United States v. Baker,* 693 F.2d 183, 186 (D.C. Cir. 1982); *United States v. O'Malley,* 378 F.2d 401, 404 (1st Cir. 1967).

Thus, at the very least, Defendant should have been charged with having "willfully" violated Section 511, but he was not, and the case law clearly mandates that the indictment should, therefore, be dismissed. Dismissal of the indictment is critical to the protection of several of Defendant's rights guaranteed him by the United States Constitution. The most crucial and heavily implicated of these in such a case is the Fifth Amendment right to answer only to a grand jury. *Denmon*, 483 F.2d at 1095, 1097 (stating that the Fifth Amendment right to answer only to a grand jury was the "specific reason", and later, the "major constitutional reason" why the indictment was held defective in that case).

This Court has articulated the rationale behind the Fifth Amendment guarantees:

> "If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment be (sic) a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer', may be frittered away until its value is almost destroyed. . . . Any other adoption would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and a prisoner can be called upon to answer the indictment as thus changed,

> the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of the indictment, in reality no longer exists." We affirmed this rule only recently, pointing out that "the very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge."

Russell v. United States, 369 U.S. 749, 770-771 (1962) (Citations omitted). Furthermore, "(i)n order to guarantee that a defendant will not be brought to trial except for charges found by a grand jury the rule has been established that an invalid indictment cannot be cured by amendments or additions but only 'by resubmission to the grand jury.' *Russell,* 369 U.S. at 770." *Opsta,* 659 F.2d at 850. The rationale for this rule is that the court cannot predict whether the grand jury would have indicted a defendant if the prosecution would have had to present evidence that the defendant knew he was violating the law. *Denmon,* 483 F.2d at 1097. In the instant case, Defendant did not know he was behaving unlawfully. As the Supreme Court pointed out in *Russell,* neither the court nor the prosecution may now step into the shoes of the grand jury and say that the grand jury would have certainly returned an indictment charging defendant with violating Section 511 with an unlawful intent. *See also, United States v. Keith,* 605 F.2d 462, 464 (9th Cir. 1979).

Moreover, the right to answer only to a grand jury is not the only constitutional protection at risk in this situation. Also at stake, are Defendant's Fifth and Sixth Amendment rights to be fairly apprised of the charges against him so that he may prepare a proper defense and

to be protected from double jeopardy. *Denmon,* 483 F.2d at 1095; *United States v. Camp,* 541 F.2d 737, 740 (8th Cir. 1976); *Mekjian,* 505 F.2d at 1324.

Where criminal intent is required, "knowingly" by itself, is never sufficient. "Knowingly" has a different meaning than "willfully" which itself has various interpretations. *See Mekjian,* 505 F.2d at 1324 and discussion *supra.* The opinion of the Court of Appeals in this regard is erroneous and this Court should grant this Petition and reverse the lower court with instructions to dismiss the Indictment.

C. 18 U.S.C. Section 511 violates the Fifth and Eighth Amendments to the United States Constitution because it does not afford due process and because it provides for cruel and unusual punishment.

(1) 18 U.S.C. Section 511 violates the Fifth Amendment due process clause to the United States Constitution because it is overly vague both on its face and as applied to this Defendant and because the penalties and stigma of conviction under this statute are too great where there is no criminal intent requirement.

A statute may be void for vagueness under a number of circumstances. The first of these is where the statute fails to give a person of ordinary intelligence fair notice that his conduct is forbidden by the statute. *United States v. Harriss,* 347 U.S. 612, 617 (1954); *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972). A separate but closely related circumstance which would render a statute unconstitutionally vague is if the ambiguity of the statute encourages arbitrary and erratic arrests and convictions. *Thornhill v. Alabama,* 310 U.S. 88 (1940);

Herndon v. Lowry, 301 U.S. 242 (1937); *Papachristou*, 405 U.S. at 162. Further considerations which may also contribute to a finding of impermissible vagueness include whether the statute makes conduct criminal which is normally considered innocent, *Papachristou*, 405 U.S. at 163; *Village of Hoffman Estates, et al. v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497, n.9 (1982), or whether the purpose of the statute is too tenuously connected to its broad reach. *Papachristou*, 405 U.S. at 171. Furthermore, in regard to the above inquiries, the courts have recognized that the constitutionality of a vague statute is closely related to whether that statute incorporates a requirement of criminal intent. *Colautti v. Franklin*, 439 U.S. 379, 395 (1979); *see also, United States v. United States Gypsum Co.*, 438 U.S. 422, 434-446 (1978); *Papachristou*, 405 U.S. at 163; *Boyce Motor Lines v. United States*, 342 U.S. 337, 342 (1952). Thus, courts have also recognized there are due process restrictions on Legislature's ability to enact strict liability crimes. *United States v. Foley*, 598 F.2d 1323, 1335 (4th Cir. 1979), *cert. denied*, 444 U.S. 1043, 100 S.Ct. 727, 62 L.Ed.2d 728 (1980). In accordance with these restrictions, many courts have held that "if Congress attempted to define a *malum prohibitum* offense that placed an onerous stigma on an offender's reputation and that carried a severe penalty, the Constitution would be offended." *United States v. Heller*, 579 F.2d 990 (6th Cir. 1978). One court was more detailed in its analysis:

> From these cases emerges the proposition that where a federal criminal statute omits mention of intent and where it seems to involve what is basically matter of policy, (sic) where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, where

> the penalty is relatively small, where conviction is not gravely besmirched, where the statutory crime is not one taken over from the common law, and where congressional purpose is supporting, the statute can be construed as one not requiring criminal intent. The elimination of this element is then not violative of the due process clause.

Holdridge v. United States, 282 F.2d 302, 310 (8th Cir. 1960) (Blackmun, J.). *See also, United States v. Wulff,* 758 F.2d 1121 (6th Cir. 1985); *United States v. St. Pierre,* 578 F.Supp. 1424, 1428-1429 (D.S.D. 1983). Generally, criminal statutes which proscribe felonies and which make lengthy prison terms possible upon conviction will fail this due process inquiry if criminal intent is not part of the crime. *See, Wulff,* 758 F.2d 1121; *St. Pierre,* 578 F.Supp. 1424 (D.S.D. 1983).

Absent a finding by this Court that criminal intent is an essential element of 18 U.S.C. Section 511 this statute is unconstitutionally vague under every due process vagueness inquiry.

First of all, this statute does not afford notice to a reasonable person that his conduct is prohibited. *Harriss,* 347 U.S. at 617; *Papachristou,* 405 U.S. at 162; *Colautti,* 439 U.S. at 390. The fair warning principle is a fundamental aspect of our concept of constitutional liberty. *Marks v. United States,* 430 U.S. 188, 191 (1977); *Stepniewski v. Gagnon,* 732 F.2d 567, 572 (7th Cir. 1984). Criminal statutes must be reasonably definite as to persons and conduct within their scope and a statute must be held void when it is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. *United States v. Chatman,* 538 F.2d 567 (4th Cir. 1976). The statute prohibits

among other things, "tamper(ing) with" a vehicle identification number. This is an extremely vague term about which reasonable men would differ, and the Defendant was so charged. Furthermore, in subsection (b) of Section 511, a "person who repairs" a vehicle or part which has had a vehicle identification number "tampered with" is excepted from the statute's application. Thus, this exception is entirely vague and indefinite. Moreover, under the same exception, such "person who repairs" will only be safe from conviction if the activity with respect to the vehicle identification number was "reasonably necessary for the repair." These words render this exception doubly vague since a person of reasonable intelligence would not know if this statute applied to him or not. This is precisely the vagueness and lack of notice which the due process clause seeks to prevent. Where "(all persons) are entitled to be informed as to what the State commands or forbids," Section 511 is void for vagueness. *Lanzetta v. New Jersey,* 306 U.S. 451, 453 (1939).

This statute is also void for vagueness because it encourages arbitrary and erratic arrests and convictions. *Papachristou,* 405 U.S. at 162; *Colautti,* 439 U.S. at 394. This area of inquiry is closely related to that of fair notice since if the actor cannot know whether his conduct is proscribed under the law, police and prosecutors cannot be expected to know either. It appears that this statute, which is admittedly designed to thwart organized vehicle theft, is deliberately broad and vague so that police may arrest anyone that they suspect may be remotely related to organized vehicle theft. If someone is arrested for tampering with a vehicle identification number, whether that "tampering" charge arises from wholly innocuous activity or not, who could suc-

cessfully challenge an officer's decision that a person was "tampering"? Who can challenge a prosecutor's definition of "person who repairs" or "reasonably necessary"? Thus, since the terms of the statute are so malleable and open to interpretation, the statute is a vessel for official abuse. *Papachristou*, 405 U.S. at 168. Therefore, this vagueness inquiry also leads to the conclusion that the statute violates the due process clause.

The vagueness of the statute is betrayed on other fronts as well. For example, Section 511 renders otherwise innocent activities criminal, largely by virtue of the fact that there is no criminal intent element in the statute. *See Papachristou*, 405 U.S. at 163. If a person removes the vehicle identification number on his or her vehicle, for whatever idiosyncratic reason, no matter how innocent, that person is still subject to conviction under Section 511, as well as a five-year prison term and/or a $250,000 fine. Furthermore, most people would undoubtedly not have the slightest reason to know that "tampering with" or removing a vehicle identification number is prohibited by federal statute that renders such activity a felony punishable by stiff fines and by a very long prison sentence. Indeed, the Defendant in the instant case did not know this. Thus, Congress has needlessly swept innocent activity up into the purview of Section 511. The Court in *Papachristou* stated:

> This aspect of the vagrancy ordinance before us is suggested by what this court said in 1876 about a broad criminal statute enacted by Congress; "it would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."

Id. at 165. (Citations omitted). Another problem with this statute which underscores its vagueness is that the presumption that a person who tampers with a vehicle identification number is necessarily involved in organized vehicle theft or a chop shop operation "is too precarious for a rule of law." *Id.* at 171. For the stated purpose of inhibiting organized vehicle theft and chop shop operations, there is no need for the law to also sweep people acting without criminal intent into the path of a Section 511 arrest, prosecution and conviction.

Clearly, criminal intent is the crux of the vagueness inquiry in this case as in most others. The courts have universally recognized that a criminal intent requirement often mitigates or cures an otherwise vague criminal statute. *Id.* at 163. *See also, Screws v. United States,* 325 U.S. 91 (1945); *Nova Records v. Sendak,* 706 F.2d 782, 789 (7th Cir. 1983). Conversely, the absence of a criminal intent requirement often exacerbates vagueness. *Colautti,* 439 U.S. at 394. Absent a scienter requirement, a vague statute merely becomes a "trap for those who act in good faith." *United States v. Ragen,* 314 U.S. 513, 524 (1942). Moreover, as stated earlier, the Supreme Court "has long recognized that the constitutionality of a vague (statute) . . . is closely related to whether that (statute) incorporates a requirement of *mens rea.*" *Colautti,* 439 U.S. at 395.

Thus, where a *malum prohibitum* statute is challenged on due process grounds, another specialized mode of constitutional inquiry emerges. The relevant issues are: Whether the statute involves only a matter of policy, whether the statute is reasonable and could properly be expected to be adhered to, whether the penalty is relatively small, whether conviction does not gravely

besmirch a defendant and his reputation, whether the statutory crime is not one taken from the common law, and whether the congressional purpose supports a no intent requirement. Only if all these questions are answered in the affirmative may the criminal statute void of a criminal intent requirement be held to satisfy due process. *Holdridge v. United States, Id.* at p. 310. The statute in the instant case appears to be one of policy, the crime does not have any common law roots, the statute is not reasonable, the penalty is relatively small, and a conviction under Section 511 would gravely besmirch the Defendant and his reputation.

In *United States v. Wulff*, 758 F.2d 1121 (6th Cir. 1985), the court was faced with a due process challenge to 16 U.S.C. Section 707(b)(2) of the Migratory Bird Treaty Act which did not require criminal intent. *Id.* at 1122. The court held that the statute was unconstitutional because the potential penalty under this section of a maximum two years imprisonment or $2,000 fine or both was not a "relatively small penalty." *Id.* at 1125. The fact that it was a felony conviction was critical, too, since a convicted felon in Michigan loses, among other civil rights, the right to sit on a jury and the right to possess a gun. *Id.* The court in *St. Pierre*, also held Section 707(b)(2) unconstitutional for the same reasons, including the fact that in addition to the rights lost by a convicted felon in Michigan a convicted felon in South Dakota also lost the right to vote. *Id.* at 1429. The court in *St. Pierre* was also faced with a due process challenge for another section of 16 U.S.C. Section 707 but held that it passed constitutional muster because the maximum penalty was only a fine of $500 or imprisonment for one year or both. *Id.*

Under Section 511, however, a person who tampers with a vehicle identification number, regardless of innocent conscience, is subject to a substantially more severe penalty of five years imprisonment or a $250,000 fine or both. A Section 511 conviction, too, is a felony conviction. In Missouri, a convicted felon forever loses his right to sit on a jury (Mo.Rev.Stat. Section 561.026 (1987)); and often the right to possess a concealed firearm (Mo.Rev.Stat. Section 71.090 (1987)); and often the right to vote (Mo.Rev.Stat. 561.026 (1987)). Defendant, a Missouri citizen, has lost all of these rights. Absent an intent requirement, such penalty is per se unreasonable, vague, and in violation of due process. Thus, under any due process inquiry, Section 511 is clearly unconstitutional. This Court should grant this Petition and reverse the lower court with instructions to dismiss the Indictment.

(2) 18 U.S.C. Section 511 violates the proscription of the Eighth Amendment to the United States Constitution against cruel and unusual punishment because it provides for five years imprisonment, or a $250,000 fine, or both, for a very minor, morally blameless, strict liability offense.

The principal concern of the American framers in including the proscription against cruel and unusual punishment in the Eighth Amendment to the United States Constitution was with the legislative definition of crimes and punishments. *In re Kemmler,* 136 U.S. 436, 446-447 (1890); *Furman v. Georgia,* 408 U.S. 238, 263 (1972) (Brennan, J. concurring); *Ingraham v. Wright,* 430 U.S. 651, 655 (1977). Thus, it is well settled that the Eighth Amendment limits the power of legislators to fashion

punishment for violation of criminal statutes. *O'Brien v. The Board of Education of the City School District of the City of New York,* 498 F.Supp. 1033, 1038 (S.D.N.Y. 1980). While the Supreme Court has never held a sentence unconstitutional based on length alone, it has recognized that a sentence which is disproportionate to the crime committed is cruel and unusual. *Solem v. Helm,* 463 U.S. 277, 284 (1983). Furthermore, the proportionality principle applies in the cases of imprisonment with equal force as in capital cases. *Id.* at 289. Additionally, many circuits which have been faced with the question have explicitly held that the Eighth Amendment prohibits some prison sentences for trivial offenses solely because of their length. *Carmona v. Ward,* 576 F.2d 405, 409 (2d Cir. 1978), *cert. denied,* 439 U.S. 1091, 99 S.Ct. 874, 59 L.Ed.2d 58 (1979); *Rummel v. Estelle,* 587 F.2d 651, 655 (5th Cir. 1978), *aff'd,* 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980). As noted by Justice Stewart, "(a) sentence may be excessive if it serves no acceptable social purpose, or is grossly disproportionate to the seriousness of the crime." *Rummel v. Estelle,* 445 U.S. 263 at 293. (Stewart, J. concurring). Even "a single day in jail may be unconstitutional in some circumstances." *Solem v. Helm,* 463 U.S. at 290.

Thus, the cases indicate that the Court should focus the bulk of the disproportionality inquiry in the seriousness of the offense and the possible sentence to be imposed. The inescapable conclusion is that absent an intent requirement, the punishment which a morally blameless person may face under this statute of five years in prison and a $250,000 fine is shocking to one's sense of human decency. Although the Defendant recognizes that the courts are bound to defer to the legislature in matters of punishment, the legislature's choice must be struck down

when it has no "rational basis" and when it would be "rejected in modern thought." *Rummel v. Estelle,* 587 F.2d at 661. Subjecting a person to such a severe penalty, the least of which is a felony conviction, for behavior which, as in this case, may be totally void of criminal mind, certainly has no rational basis. No penalogical goals are served. There is no deterrent value, no retributive value, and no rehabilitative value. Furthermore, it is of little comfort to an accused that the judge may recognize the fact that he is morally innocent and accordingly make the sentence lighter: "(t)he threat makes the punishment obnoxious." *Trop v. Dulles,* 356 U.S. 88, 102 (1958). The mere possibility that such a sentence may be imposed would give the prosecutor more bargaining leverage than he would have if the penalty were not quite so disproportionate. Moreover, no one can guarantee that a particular judge, given virtually unchecked discretion, would not actually impose the maximum sentence come judgment day. If the unwitting violator is unlucky enough to have prior felony convictions, regardless of how innocent he may have been in this one instance, a judge may very well impose the maximum penalty. Such a sentence may be imposed despite the fact that "tampering with" a vehicle identification number without a criminal mind is a terribly trivial infraction.

Therefore, given the lack of a criminal intent requirement in this statute, the penalties which it provides for in the event of a violation render Section 511 facially invalid. The maximum penalty would be cruel and unusual punishment for morally blameless behavior in violation of the Eighth Amendment to the United States Constitution. Under this circumstance, the court should grant this Petition, and reverse the lower court with instructions to dismiss the Indictment.

CONCLUSION

For the reasons stated, the Petition should be granted.

Respectfully submitted,

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March, 1989

APPENDICES

(Filed September 21, 1988)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2283

United States of America,
Appellee,

v.

Marvin B. Enochs,
Appellant.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: May 12, 1988
Filed: September 21, 1988

Before WOLLMAN, Circuit Judge, SNEED,* Senior Circuit Judge, and BEAM, Circuit Judge.

WOLLMAN, Circuit Judge.

Marvin B. Enochs entered a conditional guilty plea to one count of violating 18 U.S.C. § 511(a) (1987) by knowingly removing the vehicle identification number (VIN) from a stolen vehicle. The district court[1] sentenced him to five years' probation, a $28,000 fine, and

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*The HONORABLE JOSEPH T. SNEED, Senior Circuit Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

1. The Honorable Elmo B. Hunter, Senior United States District Judge for the Western District of Missouri.

400 hours of community service. On appeal, Enochs claims that an implied element of section 511(a) is that the defendant must act with the awareness that his actions are unlawful. He further argues (1) that he lacked such intent and that therefore his conviction must be vacated, (2) because the indictment did not allege such intent it must be dismissed, and (3) that because section 511(a) does not include language explicitly requiring specific intent, it is both unconstitutionally vague and results in cruel and unusual punishment. Because section 511(a) does not require that the defendant act with specific intent, we affirm.

The facts are not disputed. In late 1986, Enochs acquired a junked Oldsmobile Cutlass Ciera. In an effort to obtain replacement parts, he unwittingly contacted a government informant, who agreed to furnish Enochs with a front end to a Cutlass Ciera. The informant told Enochs the front end was stolen. Enochs then removed the VIN from the "stolen" front end and replaced it with the VIN from the junked car, before rebuilding the junked car with the "stolen" part.

Section 511 states:

> (a) Whoever knowingly removes, obliterates, tampers with, or alters an identification number for a motor vehicle, or motor vehicle part, shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> (b)(1) Subsection (a) of this section does not apply to a removal, obliteration, tampering, or alteration by a person specified in paragraph (2) of this subsection (unless such person knows that the vehicle or part involved is stolen).

(2) The persons referred to in paragraph (1) of this subsection are—

(A) a motor vehicle scrap processor or a motor vehicle demolisher who complies with applicable State law with respect to such vehicle or part;

(B) a person who repairs such vehicle or part, if the removal, obliteration, tampering, or alteration is reasonably necessary for the repair; and

(C) a person who restores or replaces an identification number for such vehicle or part in accordance with applicable State law.

We look first to the language of the statute. "Whoever knowingly removes" a VIN "shall be fined * * * or imprisoned * * *." 18 U.S.C. § 511(a). We find this language clear on its face. To act "knowingly" is to act "voluntarily and intentionally, and not because of mistake or accident or other innocent reason." *Milentz v. United States,* 446 F.2d 111, 114 n.4 (8th Cir. 1971). *See Manual of Model Criminal Jury Instructions for the Eighth Circuit* § 3.14 (1985). Section 511 clearly prohibits the intentional removal or alteration of VIN's, save in certain specified circumstances, and when "Congress has explicitly spelled out the required mental state," we must adhere to it. *United States v. Gantos,* 817 F.2d 41, 43 (8th Cir.), *cert. denied,* 108 S. Ct. 175 (1987).

The fact that Congress intended section 511 to broadly proscribe all intentional removal or alteration of VIN's is also evidenced by the structure of the statute. Subsection (b), which exempts large groups of persons who may have legitimate need to remove a VIN, would be

unnecessary if subsection (a) only reached those who removed VIN's with the specific intent to violate the law. If Congress had intended 511(a) to require specific intent, it certainly could have added an appropriate phrase, such as "for an unlawful purpose," or some similar qualifying phrase, much as it qualified the exceptions in subsection (b)(1). Instead, it drafted a broad statute and then carved specific exceptions from it.

Additionally, the legislative history to section 511 indicates that Congress intended to broadly prohibit the deliberate removal of VIN's except as necessary for repair in order to create powerful and "much-needed prosecutory tools" to combat auto theft. *Motor Vehicle Theft Law Enforcement Act of 1984*, H.R. Rep. No. 98-1087, 98th Cong., 2d Sess. 1, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4628, 4628-29. Congress also sought to build into the statute "safeguards to protect the innocent," and expressly relied on prosecutors not to abuse the breadth of the language. *See id.* at 4629, 4650 ("[i]t is intended that law enforcement officials use their prosecutorial discretion" and disregard violations not connected to criminal activity). Although the primary purpose of the Motor Vehicle Theft Act, of which section 511 is a part, is to prosecute "chop shops," *see id.* at 4630-31, if individuals were free to remove the VIN from their own vehicles, this goal would be hindered.

Enochs makes two arguments. First, he claims that *Liparota v. United States*, 471 U.S. 419 (1985), and *United States v. Marvin*, 687 F.2d 1221 (8th Cir. 1982), *cert. denied*, 460 U.S. 1081 (1983), require that a defendant must act with specific intent, knowing he is violating the law, to violate section 511(a). *Liparota* and *Marvin* dealt with the interpretation of 7 U.S.C. § 2024(b), which pun-

ishes "whoever knowingly uses, transfers, acquires, alters, or possesses [food stamps] * * * in any manner not authorized by this chapter * * *." 7 U.S.C. § 2024(b). *See Liparota,* 471 U.S. at 426; *Marvin,* 687 F.2d at 1227. The issue in both cases was whether "knowingly" modified only "uses, transfers, acquires, alters or possesses," or whether it also modified "in any manner not authorized." *See Liparota,* 471 U.S. at 423; *Marvin,* 687 F.2d at 1226. Both courts found the statute ambiguous on its face before concluding that section 2024(b) required that the defendant be aware he was violating the law. *See Liparota,* 471 U.S. at 424, 433; *Marvin,* 687 F.2d at 1226, 1227. Neither *Liparota* nor *Marvin* is applicable, however, because section 511 contains no language similar to the "in a manner not authorized by this chapter" language of section 2024(b) and is obviously structured differently from section 2024 by virtue of its exceptions. *See United States v. Porter,* 842 F.2d 1021, 1026 (8th Cir. 1988); *see also United States v. Udofot,* 711 F.2d 831, 837 (8th Cir.) (when there is no ambiguity in the statute, *Marvin* is inapplicable), *cert. denied,* 464 U.S. 896 (1983).

Enochs next argues that unless section 511(a) is interpreted to require specific intent, innocent persons who remove or obliterate their VIN's for innocent reasons, or perhaps no reason at all, will be prosecuted. We are not persuaded that many individuals will remove their VIN on a whim, and we note that this is not such a case: Enochs intentionally removed the VIN from a car part he believed to be stolen in order to mask his wrongdoing. In addition, section 511 exempts from punishment anyone who finds it reasonably necessary to remove or alter his VIN in the course of repairing his vehicle. *See* 18 U.S.C. § 511(b)(2)(B). Also, the definition of "knowingly" referred to above would exculpate

innocent actors. Finally, it should come as a surprise to no one that the government heavily regulates the use of automobiles and that to operate an automobile one must have a VIN just as one must have license plates.[2]

We conclude that section 511(a) does not require specific intent, but only that the defendant act knowingly, and we find all of Enoch's challenges without merit. Affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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2. Although the imposition of severe penalties, especially a felony conviction, for the commission of a morally innocent act may violate the due process clause of the fifth amendment, *see United States v. Wulff*, 758 F.2d 1121, 1125 (6th Cir. 1985); *see also Morissette v. United States*, 342 U.S. 246, 256 (1952); *Marvin*, 687 F.2d at 1226; *Holdridge v. United States*, 282 F.2d 302, 310 (8th Cir. 1960) (Blackmun, J.); *but see United States v. Engler*, 806 F.2d 425, 433-36 (3d Cir. 1986), *cert. denied*, 107 S.Ct. 1900 (1987). Enochs did not raise a due process challenge to section 511.

(Filed June 3, 1987)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
WESTERN DIVISION

No. 87-00047-01-CR-W-3
No. 87-00053-01/02-CR-W-5

UNITED STATES OF AMERICA,
Plaintiff,

v.

MARVIN B. ENOCHS and
GREGORY A. WILCOX,
Defendants.

ORDER DENYING DEFENDANTS' JOINT MOTION TO DISMISS INDICTMENT FOR FAILURE TO STATE AN OFFENSE

Before the Court is the Defendants' joint motion to dismiss the indictment for failure to state an offense.

Case No. 87-00053-01/02-CR-W-5-3.

On March 10, 1987, Defendants Marvin B. Enochs and Gregory A. Wilcox were charged in a single count indictment with knowingly removing and tampering with a motor vehicle identification number in violation of 18 U.S.C. §§ 2 and 511. The indictment states in full that:

> On or about November 1, 1986, in the Western District of Missouri, Marvin B. Enochs and Gregory A. Wilcox did knowingly remove and tamper with a motor vehicle identification number (VIN) to wit: a plate bearing VIN No. 1LNBP96F8DY600448, which had been lawfully affixed by the manufacturer to a 1983 White Lincoln Towncar for purposes of identification; all in violation of Title 18, United States Code, Section 511 and 2.

Defendants first note that the indictment fails to allege that they performed the acts complained of "willfully". They argue that "willfully" is an essential element of the offense they are charged with and the failure to include it makes the indictment insufficient. However, Section 511 requires that the acts it prescribes be done knowingly, which is precisely what the indictment alleges. And, the Eighth Circuit has recently held that "willfully" does not have to be included in an indictment under 18 U.S.C. § 2. *See United States v. McKnight,* 799 F.2d 443, 444-446 (8th Cir. 1986). Thus, the Court rejects this argument.

The Defendants' next argument is that 18 U.S.C. § 511 (b) contains several statutory exceptions to the offenses described in Section 511(a) and the failure to allege that the Defendant is "not worthy" of the exceptions causes the indictment to fail. Defendants cite to *United States v. Sarkisian,* 231 F.Supp. 489 (D. Colo. 1964). However, that case distinguished statutory exceptions that are an integral part of the definition of the offense, from these which are merely matters of defense. Only the former, *Sarkisian* held, are required to be included in the indictment. Here, the exceptions are merely matters of defense and thus do not have to be included in the indictment.

Finally, Defendants argue that despite the use of "knowingly," the indictment is defective because it "does not state that Defendants had knowledge of the law and intentionally violated it." The Court, also, rejects this argument. The indictment generally states the statutory language and otherwise sufficiently apprises the Defendants of the charge being made against them (i.e. knowingly removing and tampering with a motor vehicle identification number) so that they can adequately defend themselves. It, likewise, is sufficiently detailed to allow the Defendant to know if he is being subjected to double jeopardy. The indictment also properly alleges jurisdiction and venue. This is all that is required under the constitution and statutes of the United States. *See Ressell v. United States*, 369 U.S. 749, 763-64 (1962).

The indictment in this case adequately states an offense. The Defendants' Joint Motion to Dismiss it is, therefore, denied.

Case No. 87-00047-01-CR-W-3

On March 9, 1987, Defendant Enochs was charged in a two count indictment which reads as follows:

> Count One: On or about January 8, 1987, in the Western District of Missouri, Marvin B. Enochs did knowingly remove and tamper with a motor vehicle identification number (VIN) to wit: a plate bearing VIN No. 1G3AJ19R7GD399629, which had been lawfully affixed by the manufacturer to a 1986 Oldsmobile Ciera for purposes of identification; all in violation of Title 18, United States Code, Section 511.
>
> Count Two: On or about January 22, 1987, in the Western District of Missouri, Marvin B. Enochs

did willfully possess, with intent to sell, a motor vehicle, to wit: a 1986 Oldsmobile Ciera, true vehicle identification number (VIN) 1G3AJ19R7GD399629, knowing that said public vehicle identification number plate for such motor vehicle had been unlawfully tampered with; all in violation of Title 18, United States Code, Section 2320.

Defendant Enochs makes the same arguments in this case as were made by him and Wilcox in Case No. 87-00053-01/02-CR-W-5-3. The Court rejects these arguments for the same reasons set out above and Enochs' motion to dismiss is, therefore, denied.

SO ORDERED.

/s/ Elmo B. Hunter
Senior United States District Judge

Date 6-3-'87.

(Filed June 3, 1987)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
WESTERN DIVISION

No. 87-00047-01-CR-W-3
No. 87-00053-01/02-CR-W-5

UNITED STATES OF AMERICA,
Plaintiff,

v.

MARVIN B. ENOCHS and
GREGORY A. WILCOX,
Defendants.

ORDER DENYING DEFENDANTS' MOTION TO DISMISS INDICTMENT BECAUSE 18 U.S.C. §§ 511 AND 2320 ARE UNCONSTITUTIONAL

Defendants Marvin B. Enochs and Gregory A. Wilcox have filed a motion to dismiss the indictments in cases 87-00047-01-CR-W-3 and 87-00053-01/02-CR-W-5-3. They allege that the

> statutes are unconstitutionally vague in violation of Defendants' rights under the fifth and fourteenth amendments to the United States Constitution to due process of law, violate Defendants' rights to fair notice of the charges under the fifth, sixth and fourteenth amendments to the United States Constitution. Such statutes also permit arbitrary and discriminatory enforcement in violation of Defendants'

right to due process of law under the fifth and fourteenth amendments to the United States Constitution.

Defendant Enochs argues that 18 U.S.C. § 2320 (1) is unconstitutionally vague because it does not require sufficient culpable intent; (2) is vague because of the way the exceptions in subsection (b) were written; and (3) violates due process because it does not require an unlawful motive on the part of the Defendant. The Defendant has not furnished the Court with any cases which support these arguments and the Court has not found any on its own.[1] After carefully examining the statute in light of Defendants' arguments, the Court finds that the statute is constitutional in all respects.

Defendants Enochs and Wilcox offer the same arguments with respect to 18 U.S.C. § 511. The Court, likewise, rejects them and finds that statute constitutional in all respects.

Defendants' joint motion to dismiss indictments because 18 U.S.C. §§ 511 and 2320 are unconstitutional is, therefore, denied.

SO ORDERED.

/s/ Elmo B. Hunter
Senior United States District Judge

Date 6-3-'87

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1. Defendant has furnished several case citations and quotes which, while generally correct, do not support defendant's arguments.

(January 13, 1989)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2283WM

United States of America,
Appellee,

vs.

Marvin B. Enochs,
Appellant.

Appeal from the United States District Court for the Western District of Missouri.

Appellant's petition for rehearing has been considered by the Court and is denied.

January 13, 1989

Order entered at the Direction
of the Court:

/s/ Robert D. St. Vrain
Clerk, U. S. Court of Appeals,
Eighth Circuit.